Office-Supreme Court, U.S.
FILED
AUG 18 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-2125

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

METROPOLITAN PACKAGE STORE ASSOCIATION, INC.,; PAUL WAYNE, d/b/a COLONY LIQUORS; and WILLIAM GRANT & SONS, INC.,

Plaintiffs-Appellants,

-against-

EDWARD I. KOCH, as Mayor of the City of New York, and THE CITY OF NEW YORK; and JAMES H. TULLY, JR., et al. as Members of the STATE TAX COMMISSION, and EDWARD J. McLAUGHLIN, et al. as Members of the STATE LIQUOR AUTHORITY,

Defendants-Appellees,

ACE WINES & LIQUORS, INC., et al. and RETAILERS ALLIANCE, INC., et al.,

Intervenors-Appellees.

On Appeal from the Court of Appeals
of the State of New York

MOTION TO DISMISS, OR TO AFFIRM

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TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	2
New York Statutes Involved and Statutory Background	4
Enabling Act	4
Local Law No. 30	6
State Liquor Authority Bulletin No. 529	10
Statement of Case	12
FACTS	14
POINT I:	
THE CITY TAX, AS SPECIFICALLY AUTHORIZED AND REQUIRED BY THE ENABLING ACT, IS IMPOSED NOT ONLY UPON IMPORTERS OF BEER AND LIQUORS, BUT ALSO UPON PERSONS ACQUIRING, OR PRODUCING, MANUFACTURING, BREWING, DISTILLING, ETC. BEER AND LIQUORS WITHIN THE CITY. AND IT IS IMPOSED ON A WHOLLY LOCAL TRANSACTION, THAT IS, THE SALE OR USE OF BEER OR LIQUORS WITHIN THE CITY. HENCE, APPELLANTS' CONTENTION THAT THIS TAX VIOLATES THE IMPORT-EXPORT CLAUSE AND THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION IS WITHOUT SUBSTANCE OR MERIT.	21

Page

POINT II:

INSOFAR AS BASED UPON VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES, THE APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION SINCE IT IS NOT BASED UPON REPUGNANCE OF LOCAL LAW NO. 30 TO THOSE CONSTITUTIONAL PROVISIONS. IN ANY EVENT, IT SHOULD BE DISMISSED FOR FAILURE TO PRESENT A SUBSTANTIAL CONSTITUTIONAL ISSUE. 27

POINT III:

THE SUPREMACY CLAUSE AND THE XXI AMENDMENT OF THE FEDERAL CONSTITUTION ARE WHOLLY IRRELEVANT HERE. APPELLANTS' CONTENTIONS THAT THE LOCAL LAW VIOLATES THOSE PROVISIONS ARE WHOLLY WITHOUT SUBSTANCE. ... 34

CONCLUSION 36

APPENDIX:

New York State Tax Law:

§420, subd. 4 ..... 1aa

§424, subd. 1(a)-(f) 2aa

§445 ..... 3aa

Page

TABLE OF CASES

Community Communications Co. v. Boulder, 455 U.S. 40 (1982) ... 35

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 24

Cunard Steamship Co. v. Mellon, 262 U.S. 100 (1923) 30

Guaranty Trust Co. v. Blodgett, 287 U.S. 509 (1933) 23

House of Seagram v. State Liq. Auth., 25 NY 2d 865 (1969), affg. on op. of App. Div., 30 AD 2d 380 (3rd Dept., 1968), app. dsm. and cert. den., 396 U.S. 121 (1969) .. 22

House of York, Ltd. v. Ring, 322 F. Supp. 530 (D.C.N.Y., 1970) 22

Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1959) 23

Lash's Products Co. v. United States, 278 U.S. 175 (1929) 28

Mancini v. McLaughlin, 54 NY 2d 860 and 863 (1981) .. 10 fn, 17 fn, 35

McGoldrick v. Berwind White Co., 309 U.S. 33 (1940) 24

Metropolitan Package Store v. Koch, 89 AD 2d 317 (3rd Dept., 1982), affd. 58 NY 2d 1112 (1983) ..... 3, 17 fn, 22, 24, 29, 36

Page

Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976), reh. den. 424 U.S. 935 (1976) 24

People ex rel. Knott Corp. v. Graves, 286 N.Y. 377 (1941) ..... 7 fn

Sonneborn Bros. v. Cureton, 262 U.S. 506 (1923) 30

Southern Pacific v. Gallagher, 306 U.S. 167 (1939) 25

Washington Rev. Dept. v. Stevedoring Assn., 435 U.S. 734 (1978) . 24

Wiloil Corp. v. Pennsylvania, 294 U.S. 169 (1935) 25

Woodruff v. Parham, 8 Wall. (U.S.) 123 (1868) ..... 30 fn

STATUTES

Federal Constitution:

Commerce Clause .... 13, 14, 21, 23 fn

Due Process Clause of the Fourteenth Amendment .. 13, 15, 27, 37

Equal Protection Clause of the Fourteenth Amendment 13, 15, 27, 37

Import-Export Clause ..... 13, 14, 21, 23, 23 fn

Supremacy Clause ... 13, 15, 34, 37

Page

Twenty-First Amendment 13, 15, 34, 36, 37

Federal Statutes:

28 U.S.C. §1257, subd. 2 ..... 2, 28, 32

New York State Laws:

Chapter 142 of 1933 5

Chapter 242 of 1970, §1 ..... 9 fn

Chapter 242 of 1970, §8 ..... 9 fn

Chapter 406 of 1971 ..... 3, 5

Chapter 5 of 1972, §2(b) ..... 7 fn

Chapter 433 of 1978 3

New York State Alcoholic Beverage Control Law: ..... 10, 19 fn

§101-b, subds. 1, 2 11

§101-b, subds. 3(a),(b) 11

State Liquor Authority Bulletin No. 529 ..... 10, 11, 17, 18, 19 fn, 20, 27, 28, 32, 35

New York State Tax Law:

Article 18 ..... 4, 5, 6, 16, 19 fn

§420, subd. 4 ..... 8, 23 fn

§421 ..... 9 fn, 25, 32

Page

§422 ..... 9 fn, 25, 32

§424, subd. 1 ..... 5, 6, 23 fn

§425 ..... 9, 9 fn, 30, 31

§426 25

§428 25

§433 25

§445 ..... 3, 4, 5, 6, 36

§445, subd. 1 ..... 5, 6

§445, subd. 2 ..... 5, 6

§445, subd. 3 ..... 5, 8, 9

§445, subd. 4 ..... 5, 6, 19 fn

New York City Local Law:

No. 30 of 1980 .. 3, 4, 6, 7, 12, 16, 17, 18, 19, 19 fn 27, 28, 29, 30, 32, 34

New York City Administrative Code:

§Y46-1.0, subd. 6 ..... 8, 22, 23 fn

§Y46-2.0, subd. (a) ..... 23 fn, 24

§Y46-2.0, subd. (a)(1) 7

§Y46-2.0, subd. (a)(2) 7, 21

§Y46-2.0, subd. (b) 7

Page

§Y46-3.0 9

§Y46-4.0 ..... 19 fn

§Y46-6.0 4

TEXTS

John F. Due, State and Local Sales Taxation: Structure and Administration (1971) ..... 26 fn

Lennox Lee Moak and Frank Coward, Jr., Manual of Suggested Practices for Administration of Local Sales and Use Taxes (1961) ..... 26 fn

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Plaintiffs-Appellants,

-against-

EDWARD I. KOCH, as Mayor of the City of New York, and THE CITY OF NEW YORK; and JAMES H. TULLY, JR., MILTON KOERNER and THOMAS H. LYNCH as President and Members of the STATE TAX COMMISSION; and EDWARD J. McLAUGHLIN, TERRENCE R. FLYNN, HUGH B. MARIUS, and ROBERT T. DOYLE as Chairman and Members of the STATE LIQUOR AUTHORITY,

Defendants-Appellees,

ACE WINES & LIQUORS, INC., et al. and RETAILERS ALLIANCE, INC., et al.,

Intervenors-Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION OF DEFENDANTS-APPELLEES KOCH AND THE CITY OF NEW YORK, AND TULLY et al. AS MEMBERS OF THE NEW YORK STATE TAX COMMISSION TO DISMISS OR AFFIRM

Appellees move to dismiss the appeal or, alternatively, to affirm the order appealed from: (1) for lack of jurisdiction under 28 U.S.C. §1257(2) of Questions I, II, IV, and VI stated in the Jurisdictional Statement, and (2) on the grounds that the appeal on all the questions stated therein present no substantial federal question, and that the questions presented are so manifestly unsubstantial as not to need further argument.

PRELIMINARY STATEMENT

Appellants appeal from an order of the Court of Appeals of the State of New York dated March 29, 1983 (2a-3a)* which granted the motion of the Appellees to dismiss the appeals taken by the Appellants, and from an order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, entered November 16, 1982, on the

* Page references designated "-a" refer to pages in Appellants' Jurisdictional Statement.

ground that no substantial constitutional question was directly involved (1a-3a).

The Appellate Division order affirmed the judgment of the Supreme Court, Albany County, dated January 29, 1982, that denied Appellants' motion for summary judgment, granted summary judgment to Appellees and dismissed the complaint insofar as it sought an injunction. The order of the Appellate Division was based upon its opinion in which it discussed and rejected each of the constitutional contentions raised by Appellants here (20a-32a).

The judgment declared the City's Local Law No. 30 of 1980 (33a-42a) and State Tax Law §445, its Enabling Act (Ch. 406 of 1971, amend. Ch. 433, L. 1978), pursuant to which the Local Law was enacted, to be in all respects valid and constitutional.

The decision of the Court of Appeals (1a) is reported in 58 NY 2d 1112. The opinion of the Appellate Division (20a-32a) is reported in 89 AD 2d 317.

New York Statutes Involved

A copy of the City's Local Law No. 30 of 1980 is annexed to Appellants' Jurisdictional Statement (33a-42a).

Tax Law Article 18, §445, a copy of which is in the attached Appendix (pp. 3aa-6aa)* is the Enabling Act, pursuant to which the City enacted Local Law No. 30 (N.Y.C. Adm. Code, §Y46-6.0). Since the Enabling Act expressly provides that all the provisions of Tax Law Article 18 shall apply to the City taxes authorized by §445, we here summarize, in broad outline, the provisions of the said statutes and the interrelationship between the provisions thereof, which are essential to consideration of the issues involved in this appeal.

Enabling Act

Tax Law Article 18 imposes State excise taxes on distributors of alcoholic

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* Page references designated "-aa" refer to pages in Appellees' appendix.

beverages (beers, wines and liquors) sold or used within the State [§424, subd. 1(a)-(f). See 2aa], and has been in force since 1933 (L. 1933, Ch. 142).

In essence, §445, added as an amendment to Tax Law Article 18 in 1971, (L. 1971, Ch. 406), authorizes the City to impose taxes similar to the State's taxes on alcoholic beverages at specified rates, but limited to beers and liquors (no wines) and to transactions occurring within the territory of the City (§445, subds. 1, 2; cf. §424, subd. 1). Section 445 also provides that all the provisions of Article 18, so far as they can be made applicable, shall apply to the taxes the City is authorized to impose, modified so as to adapt them to local instead of State taxes, and that the words "this state" in such provisions are to be read as "this city" for purposes of the City taxes authorized (§445, subds. 3, 4).

This Enabling Act also directs that the taxes imposed pursuant to its authority shall be administered and collected by the State Tax Commission (Tax Commission) in the same manner as are the State's taxes imposed by Article 18, and that the Tax Commission shall make provision for joint administration and collection of both these State and local taxes (§445, subd. 4).

The clear intention and effect of these provisions are obviously that on every beer or liquor transaction, the sale or use of which within the City is subject to the State taxes under Article 18, the City is permitted to impose its authorized taxes; and that the Tax Commission, when collecting the State taxes on such City transaction, is also to collect the City taxes.

Local Law No. 30

As authorized by Tax Law §445 [subds. 1, 2; cf., Tax Law §424, subd. 1], Local

Law No. 30 imposes an excise tax upon distributors* of a specified sum per gallon of beer and per liter of liquor sold or used within the City [N.Y.C. Admin. Code §Y46-2.0, subds. (a)(1), (2); 36a]. It also imposes a one-shot "floor tax" upon persons other than distributors who, on the effective date of the tax, own or possess beer and liquors for purposes of sale [id., subd. (b); 37a].**

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* This tax is also imposed on "noncommercial importers." None of the Appellants is a noncommercial importer, and only one of them, Grant, is a distributor.

** The "floor tax" on persons who are not distributors is intended to prevent such persons, (retailers, for example), who had made purchases before the effective date of the local tax law, from obtaining competitive advantage as against retailers who have borne the burden of the tax in the price charged them, and to prevent evasion of the sales tax by those who made such purchases before the effective date to escape the tax [see L. 1972, Ch. 5, §2(b); People ex rel. Knott Corp. v. Graves, 286 N.Y. 377, 379 (1941)].

A "distributor", so far as pertinent, is defined as follows (N.Y.C. Adm. Code, §Y46-1.0, subd. 6; 34a):

"6. 'Distributor.' Any person who imports or causes to be imported into this city any alcoholic beverages which are or will be offered for sale or used for any commercial purpose; any purchaser of warehouse receipts for alcoholic beverages stored in a warehouse in this city who causes such beverages to be removed from such warehouse; and also any person who produces, distills, manufactures, brews, compounds, mixes or ferments any alcoholic beverages within this city for sale. ...."

The aforesaid provisions of the Local Law are in full conformity with the Enabling Act (see Tax Law §445, subd. 3); and the definition of "distributor" in both laws is identical (see §420, subd. 4; laa).

Appellants contend that the retailer Appellant falls within this Local Law's definition of "distributor" because he "imports" liquor into the City but is denied equal protection and due process because he is not treated as a distributor.

As to this, the following statutory provision is pertinent.

Tax Law §425* which is made applicable to the City's liquor tax law by the Enabling Act (Tax Law §445, subd. 3) and by the Local Law (Adm. Code §Y46-3.0), reads, so far as pertinent, as follows (with the necessary changes substituting "city" for "state" to make it applicable to the City):

"If a person shall receive any alcoholic beverages from a distributor, upon which alcoholic beverages this [state] city was without power to impose the taxes under this [article] title against such

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* Tax Law §425 was intended to prevent evasion or avoidance of the tax by persons, such as retailers, buying outside the State (or City, as to the City's tax). See, L. 1970, Ch. 242, §1). However, it merely subjects such persons to the same tax burden, but does not make them "distributors". To qualify as such a retailer would have to register and furnish a surety bond. (See Tax Law §§421, 422). See amendments to §425, enacted by L. 1970, Ch. 242, §8. None of the retailers in this action have so qualified.

distributor, and such person shall thereafter sell or use any such alcoholic beverages in such manner and under such circumstances as may subject the same to the taxing power of this [state] city with respect to such sale or use, such person shall be liable for the tax imposed by section [four hundred twenty-four] Y46-2.0, subdivision (a) with respect to such sale or use, and shall make the same reports and returns, pay the same taxes and be subject to all other provisions of this [article] title relating to distributors ...."

Bulletin No. 529 of State Liquor Authority

Although the Jurisdictional Statement does not set forth or describe Bulletin No. 529 issued by the State Liquor Authority (SLA), Appellants rely heavily upon that Bulletin (See, ii, iii, 7, 8, 9, 11).*

The following facts as to the background, purposes and contents of the Bulletin are pertinent here.

SLA was established to administer the State Alcoholic Beverage Control (ABC)

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* This despite the fact that Appellants recognize (ii, 8) that the Bulletin has been held invalid. Mancini v. McLaughlin, 54 NY 2d 860 and 863 (1981).

Law, which was enacted to promote temperance by regulating the sale of alcoholic beverages by controlling and fixing the sales prices thereof and prohibiting price discrimination in their sales (ABC Law §101-b, subds. 1, 2). Wholesalers are required to post with SLA schedules of their prices charged to retailers for every item of liquor they sell. They are required to charge the posted prices to all retailers without discrimination, and the prices cannot be changed except by posting new schedules upon the basis of increases or decreases in operating expenses with SLA permission, or without such permission upon the basis of increases or decreases in taxes [id., subds. 3(a), (b)].

Bulletin No. 529 was issued by SLA, after conferences had with wholesalers on questions they raised as to how they were to increase their prices to retailers to include the tax imposed by Local Law No.

30, in view of the facts: (1) that the tax affected only New York City while scheduled prices were to be statewide; and (2) that there was not sufficient time before August 1, 1980, the effective date of the Local Law, for them to prepare and post the new schedules of increased prices.

The Bulletin directed that, by a future date to be fixed by SLA, the wholesalers-distributors would have to post their revised price schedules, but until that time, without revised price schedules posted, all wholesalers-distributors, on their sales only to New York City retailers, had to increase their prices by the amount of the City tax, plus a markup of 20% thereof, and City retailers' prices to consumers were to be similarly increased.

Statement of Case

Appellants, a New York State wholesale liquor dealer and a retail liquor dealer, each licensed by New York State, and an Association of licensed retail

liquor dealers, all doing business in the City of New York, brought this action for a judgment declaring the tax, imposed by the City of New York upon distributors of liquor sold or used by them within the City, to be invalid on a wide variety of grounds, including specifically unconstitutionality under the Import-Export, Commerce, Equal Protection, Due Process and Supremacy Clauses, and the Twenty-First Amendment of the federal constitution. The Supreme Court, Albany County, denied Appellants' motion for summary judgment, granted summary judgment to Appellees, and entered judgment declaring the City tax to be in all respects valid and constitutional (48a-52a).

Upon appeal to the Appellate Division of the Supreme Court, Third Department, the said judgment was affirmed (32a). Appellants appealed to the Court of Appeals, on constitutional grounds, from

the said order of the Appellate Division affirming the judgment of the lower Court. The Court of Appeals granted Appellees' motion to dismiss the said appeal on the ground that no substantial constitutional question was directly involved (1a-3a).

FACTS

Because we believe that Appellants' recital of facts and issues is inaccurate and misleading in important respects we shall state the pertinent facts as set forth in the pleadings and affidavits submitted on the motion for summary judgment.

Appellants' Complaint and Papers Submitted on Motion for Summary Judgment.

In their complaint Appellants assert that the City tax law violates a wide variety of federal and state constitutional provisions, including the Import-Export Clause, the Commerce Clause, the

Due Process Clause, the Equal Protection Clause, the Supremacy Clause and the Twenty-First Amendment of the federal constitution, that they seek to rely on here.

The following are the only facts pertinent to the issues appearing in the Appellants' complaint and supporting affidavits.

The Association plaintiff is an association of licensed retail liquor dealers doing business in the City of New York. The plaintiff William Grant & Sons, Inc. (Grant) is a wholesale-distributor licensed to import wines and liquors into the United States with a place of business in New York City, where it has an office and employees and where it takes orders from New York City and Westchester retailers, which it fills by truck to the New York City Metropolitan area. It also holds an SLA wholesale liquor license authorizing it to sell liquor in New York State at the same New

York City address, and has registered as a distributor under the State Liquor Tax Law (Tax Law Article 18), and has paid the State and City liquor taxes since August 1, 1980.

The plaintiff Paul Wayne is a licensed retail liquor store operator in the City of New York where he sells "imported" liquor although he does not state he himself imports any liquors from abroad. The amounts of State and City liquor taxes are included in the seller's price of liquor sold to him. He alleges that he paid the City tax under protest.

For the rest, the complaint and supporting affidavits are devoted to Appellants' inaccurate version and interpretation of the provisions of City Local Law

No. 30, and to SLA Bulletin No. 529.* They elaborate Appellants' views of the meaning and effect of the said Bulletin in allegedly "implementing" the City's Local Law No. 30 so that the nature and incidence of the City's tax was altered from one on the distributor to one on the retailer which the distributor was required to collect from the retailer. They assert further that the Bulletin was the result of a price-fixing agreement between SLA and certain wholesalers - one made in collaboration with private citizens, not

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* Appellants admit (ii, 8), that the Court of Appeals has held that Bulletin No. 529 invalid and enjoined SLA from enforcing it. (Mancini v. McLaughlin, 54 NY 2d 860 (1981). And the Appellate Division in the instant case determined that the Bulletin was invalid and that all issues based thereon are rendered ineffective and are eliminated (89 AD 2d, at 324; 26a-27a). Nevertheless, Appellants on this appeal rely upon it, and their erroneous version of the effect thereof (ii, iii, 7-9, 11).

with or by the City or the Tax Commission, and that SLA acted illegally in promulgating the Bulletin.

Thus, appellants' action is largely based upon this invalid SLA Bulletin 529, and their distortion of the effect of the Bulletin upon the City's Local Law No. 30.

Appellees' Answers and Papers Submitted on Motion for Summary Judgment.

The Appellees' answers set forth general denials of the allegations of the complaint, and set up affirmative defenses alleging that Local Law No. 30 was enacted in conformity with authority granted by the State Enabling Act, and that SLA had no authority and did not intend to "implement" the Local Law, and that Bulletin 529

cannot and did not affect the tax imposed by the Local Law.*

The affidavits in opposition also point this out, and in an affidavit, counsel for SLA stated that SLA had not undertaken to implement Local Law No. 30.

These affidavits point out further that there are no facts in the moving papers to support Appellants' claim that the Local Law was part of a price-fixing-restraint-of-trade agreement. Moreover, the facts stated in the affidavits of

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* SLA was set up to administer the State ABC Law, a statute enacted to regulate the liquor trade (see, supra, p. 10-11). The State liquor tax law (Tax Law, Art. 18) and City liquor tax law (L.L. No. 30) are purely revenue measures, the administration of which is expressly lodged in the State Tax Commission. (Tax Law, §445, subd. 4; Admin. Code, §Y46-4.0). It is clear, therefore, that SLA had no authority to "implement" or act with respect to those liquor taxes by Bulletin No. 529 or otherwise. Hence, regardless of whether or not Bulletin No. 529 was a valid regulation by SLA in administering the ABC Law, it could not and did not affect Local Law No. 30.

three City and two State employees who, as observers, attended the meeting at which Appellants asserted that the alleged agreements were arranged, established that no one on behalf of the City or the Tax Commission, participated in or consented to any price-fixing or restraint-of-trade agreements, or in the promulgation of Bulletin No. 529. These facts are nowhere questioned or denied by Appellants.

POINT I

THE CITY TAX, AS SPECIFICALLY AUTHORIZED AND REQUIRED BY THE ENABLING ACT, IS IMPOSED NOT ONLY UPON IMPORTERS OF BEER AND LIQUORS, BUT ALSO UPON PERSONS ACQUIRING, OR PRODUCING, MANUFACTURING, BREWING, DISTILLING, ETC. BEER AND LIQUORS WITHIN THE CITY. AND IT IS IMPOSED ON A WHOLLY LOCAL TRANSACTION, THAT IS, THE SALE OR USE OF BEER OR LIQUORS WITHIN THE CITY. HENCE, APPELLANTS' CONTENTION THAT THIS TAX VIOLATES THE IMPORT-EXPORT CLAUSE AND THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION IS WITHOUT SUBSTANCE OR MERIT.

(1)

The contention that the City tax violates the Import-Export and the Commerce Clauses applies only to the Appellant Grant, the only wholesale distributor among Appellants.

The City's tax is imposed upon distributors when liquor is "sold or used within this city" [N.Y.C. Adm. Code, §Y46-2.0, subd. (a)(2);]. A "distributor" is defined to include not only importers, but

also persons acquiring alcoholic beverages stored in the City, as well as persons producing them within the City. (N.Y.C. Adm. Code, §Y46-1.0, subd. 6; 34a, quoted supra, p. 8).

In construing these provisions the State courts have held that the tax is imposed upon a purely local event - the sale or use of the beer or liquor within the City after they have come to rest in the City - and not on the transportation or shipment thereof; and that it is imposed without discrimination upon the sale in the City of such goods, not only on importers, but also on persons acquiring or producing them. (24a-26a; 89 AD 2d, at 322). See also House of Seagram v. State Liq. Auth., 25 NY 2d 865 (1969), affg. on op. of App. Div. 30 AD 2d 380 (3rd Dept., 1968), app. dsm. and cert. den., 396 U.S. 121 (1969), and House of York, Ltd. v. Ring, 322 F. Supp. 530

(D.C.N.Y., 1970), in which cases the New York State court and the three-Judge federal district court sustained the New York State liquor tax, counterpart of the City liquor tax, against similar attack.*

This construction of the City Tax Law is binding upon this Court on this appeal. Guaranty Trust Co. v. Blodgett, 287 U.S. 509, 513 (1933); Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 688 (1959).

That such a tax does not offend any of the three policy considerations underlying the Import-Export Clause and does

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* The State tax is imposed in language identical to that of the City tax law upon distributors, who are defined in the State Tax Law identically as in the City Tax Law [cf. Tax Law §424, subd. 1 and §420, subd. 4 with N.Y.C. Adm. Code §Y46-2.0, subd. (a) and §Y46-1.0, subd. 6]. Hence, if the City tax were violative of the Import-Export and Commerce Clauses, then the State Tax Law too would be invalid. The fact that Appellants attack only the City tax and fail to attack the identical State tax which also affects them in precisely similar fashion suggests the lack of merit in this appeal.

not violate that Clause has been firmly established by this Court. Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976), reh. den. 424 U.S. 935 (1976); Washington Rev. Dept. v. Stevedoring Assn., 435 U.S. 734, 751-761 (1978). These cases were cited and relied on by the Appellate Division herein in upholding the constitutionality of the City tax (24a; 89 AD 2d, at 322).

(2)

The City tax is imposed only upon goods "when sold or used within" the City [N.Y.C. Adm. Code, §Y46-2.0, subd. (a)], and the State Court has so held (see 25a; 89 AD 2d, at 323). Such a tax does not violate the Commerce Clause, Washington Rev. Dept. v. Stevedoring Assn., supra, at 734-751; Complete Auto Transit Inc. v. Brady, 430 U.S. 274 (1977); McGoldrick v. Berwind White Co., 309 U.S. 33, 49-52

(1940); Southern Pacific v. Gallagher, 306 U.S. 167, 171-172, 178 (1939); Wiloil Corp. v. Pennsylvania, 294 U.S. 169, 174-175 (1935).

(3)

Appellants' assertions in their Jurisdictional Statement that the tax intercepts Grant's imports, and is a "custom type tax" (i, 10), are wholly without support in law or by the facts in the record.

And Appellants' assertion that State Tax Law §§421, 422, 426, 428, and 433* impose unconstitutional burdens on interstate commerce (ii) are also without merit. In the first place, as we have seen, the State and the City taxes apply

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* These provisions require distributors to register, to furnish security for payment of the taxes, to keep records and make reports, and impose penalties for failure to file returns or for violating the tax law or regulations (57a-60a).

only to intrastate incidents. Moreover, provisions such as these for facilitating administration and collection of the taxes are standard and commonplace features of sales tax laws.*

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* See, John F. Due, State and Local Sales Taxation: Structure and Administration, (Public Administration Service, 1971), pp. 15, 134-136 (registration), 203-206 (bonding), 190-191 (criminal penalties); Lennox Lee Moak and Frank Cowan, Jr., Manual of Suggested Practices for Administration of Local Sales and Use Taxes, (Municipal Finance Officers Assn. of the U.S. and Canada, 1961), p. 53 (records and reports).

POINT II

INSOFAR AS BASED UPON VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES, THE APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION SINCE IT IS NOT BASED UPON REPUGNANCE OF LOCAL LAW NO. 30 TO THOSE CONSTITUTIONAL PROVISIONS. IN ANY EVENT, IT SHOULD BE DISMISSED FOR FAILURE TO PRESENT A SUBSTANTIAL CONSTITUTIONAL ISSUE.

Appellants' assertion of denial of equal protection and due process appears to be based upon the alleged effect upon retailers of the void Bulletin No. 529 (iii, 8, 10, 11).

Due Process

A. The Jurisdictional Statement states no claim of a violation of due process by Local Law No. 30; the violation asserted is based solely upon the alleged effect of Bulletin No. 529 in causing illegal payments of a 20% markup to be made by retailers to wholesalers (iii, 8, 10, 11).

There is, therefore, no issue presented here by Appellants of violation of due process by Local Law No. 30. Hence, the appeal on due process grounds must be dismissed for lack of jurisdiction (28 U.S.C. §1257, subd. 2).

B. In any event, the Local Law does not require retailers to make any tax or other payments to wholesalers (the distributors); the tax is imposed only on the distributors. Any payments by retailers to wholesalers made pursuant to Bulletin No. 529, were obviously payments of part of the price charged the retailers by the wholesalers, and are not tax payments required or made pursuant to Local Law No. 30. See, Lash's Products Co. v. United States, 278 U.S. 175 (1929).

Equal Protection

A. Appellants' claim of equal protection violation is also based upon Bulletin No.

529, and thus also fails to present any issue of such violation by Local Law No. 30.

As appears from the opinion of the Appellate Division (28a; 89 AD 2d at 325), Appellants claim denial of equal protection because, when City retailers bring into the City liquor they purchase from distributors at out-of-city points, such as New York State localities bordering the City or from New Jersey, they "import" such liquor into the City and thereby qualify as "distributors" as defined in the Local Law, but that they are not recognized or treated as such under the Local Law.

There is no merit to this contention, since the State courts have construed the word "import" in the Local Law's definition of "distributor" to refer "to transactions in foreign commerce not interstate commerce" (28a; 89 AD 2d

at 325).* Therefore, retailer Appellants do not "import" into the City such purchases from out-of-City distributors, and do not fall within the definition of "distributor" upon whom the City's tax is imposed.

They are, thus, not subjected to any tax as distributors by Local Law No. 30. Since one cannot claim denial of equal protection because one is not subjected to a tax, there is here obviously no basis for Appellants' claim of such denial. Tax Law §425 subjects persons (including retailers) buying liquor from out-of-City distributors, to a tax upon their subsequent sale of the liquor within the City, in accordance with the pro-

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* This is also the meaning of the word in its ordinary sense and in common usage. See, Woodruff v. Parharm, 8 Wall. (U.S.) 123 (1868); Cunard Steamship Co. v. Mellon, 262 U.S. 100, 122 (1923); Sonneborn Bros. v. Cureton, 262 U.S. 506, 509-512 (1923).

visions of the Local Law relating to distributors. This is, of course, not a tax on retailers as distributors.

The purpose of §425 is the same as that of the "floor tax" (see supra, p. 7), that is, to deprive such retailers, who may have avoided or evaded the financial burden of the tax by buying out of the City, of a competitive advantage by subjecting them to substantially the same financial burden vis-a-vis the tax as is borne by retailers who purchased liquor from distributors within the City. This purpose is to equalize the burden borne by all City retailers and to eliminate such financial advantage.

However, from the Jurisdictional Statement, it appears that Appellants' claim of "discrimination" in violation of equal protection is based, as is their claim of due process violation, upon an

alleged unconstitutional burden of paying the 20% markup imposed by SLA Bulletin No. 529 (8, 11).

Since this does not present an issue of violation of equal protection by Local Law No. 30, this appeal on that ground must be dismissed for lack of jurisdiction (28 U.S.C., §1257, subd. 2).

B. Aside from this, no facts were presented by Appellants in support of their motion for summary judgment, that any retailers had actually bought liquor outside the City which they had brought into the City, as to which they were subjected to discriminatory treatment. They do not claim that they had qualified as distributors as required by law (see Tax Law §§421, 422; see 57a) and had been treated differently from distributors who had so qualified. Nor do they claim that they were treated differently from other retailers

who had purchased liquors from out-of-City distributors, nor that they were subjected to greater tax burden than that imposed upon retailers purchasing from distributors within the City.

Hence, aside from lack of jurisdiction, Appellants' claim of denial of equal protection should be dismissed for lack of merit and substance.

POINT III

THE SUPREMACY CLAUSE AND THE XXI AMENDMENT OF THE FEDERAL CONSTITUTION ARE WHOLLY IRRELEVANT HERE. APPELLANTS' CONTENTIONS THAT THE LOCAL LAW VIOLATES THOSE PROVISIONS ARE WHOLLY WITHOUT SUBSTANCE.

(1)

The alleged violation of the Supremacy Clause is based upon Appellants' contention of alleged violation of federal antitrust and price-fixing laws (ii, 8).

So far as Local Law No. 30 is concerned, there is no question presented of the supremacy of these statutes. They are not here involved because the Local Law is clearly, on the face of it, purely a revenue measure; it does not in any way attempt to regulate business or to fix prices.

Moreover, Appellants assert that the agreement on which their claim of Supremacy Clause violation is based is SLA Bul-

letin 529. They state that "Bulletin 529 constitutes a price-fixing agreement between the State Liquor Authority and certain wholesalers" (ii, 8), and that the Bulletin "was issued at the request of wholesalers" (9). There is no claim that the City was party to such an agreement.*

And aside from the fact that the Bulletin has been held invalid and of no effect (Mancini case, supra), there is no basis for Appellants' assumption that the SLA illegal action with respect to the Bulletin affects the City's Local Tax Law nor for attributing SLA's illegal action to the City or the Tax Commission.**

Community Communications Co. v. Boulder, 445 U.S. 40 (1982), sought to

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* The facts in the record, moreover, show, that the City was not a party (see, supra, pp. 17-18, 19-20).

** See footnote p. 19, supra.

be relied on by Appellants (ii, 9), is inapposite. The ordinance there involved was not a tax measure, but one regulating business, to which the antitrust laws are addressed.

(2)

Nor is there any question here presented involving the XXI Amendment. The Local Law does not, as is clear by a mere reading thereof, in any way affect the transportation or importation of liquor into the State. Nor does it in any way regulate the liquor business, nor violate any of the State laws. Indeed the City's tax law is expressly authorized by its Enabling Act, Tax Law §445. (32a; 89 AD 2d, at 328).

CONCLUSION

The appeal from the order of the Court of Appeals of the State of New York should be dismissed, with respect

to Questions I (Twenty-First Amendment), II (Supremacy Clause), IV (Due Process), and VI (Equal Protection), stated in the Jurisdictional Statement, for lack of jurisdiction of this Court, and, in any event, as to all questions presented therein, the appeal from the said order should be dismissed, or in the alternative affirmed, for failure to present a substantial federal question.

Dated: August 16, 1983

Respectfully submitted,

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APPENDIX

New York State Tax Law

S 420. Definitions

As used in this article:

* * * *

4. "Distributor" means any person who imports or causes to be imported into this state any alcoholic beverages which are or will be offered for sale or used for any commercial purpose; any purchaser of warehouse receipts for alcoholic beverages stored in a warehouse in this state who causes such beverages to be removed from such warehouse; and also any person who produces, distills, manufactures, brews, compounds, mixes or ferments any alcoholic beverages within this state for sale, ***.

New York State Tax Law

§ 424. Taxes imposed

1. There are hereby levied and imposed on a distributor and a non-commercial importer excise taxes at the following rates:

(a) Four and four-ninths cents per gallon upon beers;

(b) Two and six-tenths cents per liter upon still wines, except cider containing more than three and two-tenths per centum of alcohol by volume, upon which the tax shall be four-tenths of a cent per liter;

(c) Seven cents per liter upon artifically carbonated sparkling wines, except artifically carbonated sparkling cider containing more than three and two-tenths per centum of alcohol by volume, upon which the tax shall be four-tenths of a cent per liter;

(d) Fourteen and one-tenth cents per liter upon natural sparkling wines except natural sparkling cider containing more than three and two-tenths per centum of alcohol by volume, upon which the tax shall be four-tenths of a cent per liter;

(e) Twenty-one and one-tenth cents per liter upon liquors containing not more than twenty-four per centum of alcohol by volume; and

(f) Eighty-five and nine-tenths cents per liter upon all other liquors, when sold or used within this state, except when sold or used under such circumstances that this state is without power to impose such tax***.

New York State Tax Law

§ 445. Local taxes on beer and liquor by a city of one million or more

1. Any city in this state having a population of one million or more, acting through its local legislative body, is hereby authorized and empowered to adopt and amend local laws imposing in any such city excise taxes on a distributor and a noncommercial importer at the following rates:

(a) Twelve cents per gallon upon beers and

(b) Twenty-six and four-tenths cents per liter on the liquors described in paragraph (f) of subdivision one of section four hundred twenty-four, when sold or used in such city.

Such local law shall provide that if prior to the date upon which the taxes go into effect, a contract of sale of any beer or other alcoholic beverages described above was made, and delivery thereof pursuant to such contract is made within the city imposing such taxes on or after the effective date thereof, the vendor shall be deemed a distributor, and such beer and other alcoholic beverages shall be deemed to be sold, and shall be subject to the tax at the time of such delivery.

2. Every local law imposing taxes pursuant to the authority of subdivision one shall also impose upon each person, other than a distributor within the meaning of such local law, who, on the date the taxes imposed pursuant to the authority of such subdivision become effective, owns and possesses for the purposes of sale beer, or other alcoholic beverages described in subdivision one, a floor tax at the rates applicable under subdivision one upon such beer in excess of one hundred gallons and upon such other alcoholic beverages in excess of four hundred liters. Such floor tax shall be due and

payable on the twentieth day of the month succeeding the month in which the taxes become effective.

3. All the provisions of this article shall apply to the taxes authorized by subdivision one of this section and the provisions of section four hundred twenty, four hundred twenty-six, four hundred twenty-nine through four hundred thirty-four, four hundred thirty-six and four hundred thirty-seven shall apply to the tax authorized by subdivision two thereof, so far as such article or sections can be made applicable to the taxes authorized by this section with such limitations as set forth in this section and such modifications as may be necessary in order to adapt such language to the local taxes authorized by this section. Provided, however, in every case where the words "this state" appear in subdivision four of section four hundred twenty-four exempting quantities of liquor from tax, and in the definition of "Distributor" or "Noncommercial importer" in section four hundred twenty, such words "this state" shall be read as "this city" for purposes of the taxes authorized by this section. Where the word "state" is used in a phrase referring to the sale or use of alcoholic beverages in this state, such word "state" shall be read as "city" for purposes of the taxes authorized by this section, unless the word "city" clearly is not applicable.

4. Any taxes imposed pursuant to the authority of this section shall be administered and collected by the tax commission in the same manner as the taxes imposed under sections four hundred twenty-four and four hundred twenty-five subject to all provisions of this article as may be applicable. The state tax commission is hereby empowered to make such provisions as it deems necessary for the joint administration and collection of the state and local taxes imposed and authorized by this article. Nothing in this article which requires payment of both state and local taxes to the tax commission shall

collecting and distributing such taxes, out of which the comptroller shall pay any refunds of such taxes to which taxpayers shall be entitled under the provisions of this article. The comptroller, after reserving such refund and such costs shall, on or before the twelfth day of each month, pay to the appropriate fiscal officer of such city, the taxes, penalties and interest imposed by such city under the authority of this section, collected by the state tax commission pursuant to this article during the next preceding calendar month. The amount so payable shall be certified to the comptroller by the president of the state tax commission or his delegate, who shall not be held liable for any inaccuracy in such certificate. Where the amount so paid over to such city in any such distribution is more or less than the amount then due to such city, the amount of the overpayment or underpayment shall be certified to the comptroller by the president of the state tax commission or his delegate, who shall not be held liable for any inaccuracy in such certificate. The amount of the overpayment or underpayment shall be so certified to the comptroller as soon after the discovery of the overpayment or underpayment as reasonably possible and subsequent payments and distributions by the comptroller to such city shall be adjusted by subtracting the amount of any such overpayment from or by adding the amount of any such underpayment to such number of subsequent payments and distributions as the comptroller and the president of the state tax commission shall consider reasonable in view of the amount of the overpayment or underpayment and all other facts or circumstances.